IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 5, 2006

STATE OF TENNESSEE v. ROBERT CHARLES YORK

Direct Appeal from the Circuit Court for Bedford County
No. 15955 Lee Russell, Judge

No. M2006-01508-CCA-R3-CD - Filed April 12, 2007

The defendant, Robert Charles York, pled guilty to violation of the light law, two counts of evading arrest, fourth offense driving under the influence (DUI), driving on a revoked license, and violation of the implied consent law and received an effective sentence of ten years as a Range II offender. On appeal, he challenges the sentencing decision of the Bedford County Circuit Court arguing that he should have been sentenced to community corrections rather than incarceration. Following our review of the record and the parties' briefs, we affirm the trial court's sentencing decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Andrew Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Robert Charles York.

Michael E. Moore, Acting Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; W. Michael McCown, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

On March 2, 2006, the defendant pled guilty to a six count indictment charging him with Count 1 – violation of the light law, Count 2 – evading arrest with risk of death, Count 3 – evading arrest, Count 4 – fourth offense DUI, Count 5 – driving on a revoked license, and Count 6 – violation of the implied consent law. The facts giving rise to these convictions were recited by the state at the guilty plea hearing as follows:

> [On April 25, 2005], Officer Rick Gann . . . observed a vehicle -- and he was actually patrolling, looking for a theft suspect, when he observed a white car that matched some of the information they had. He thought it might be a car of interest. It was traveling on with its marker lights on. This was at nighttime. So the officer attempted to stop the vehicle by activating his blue lights and siren. The vehicle slowed down and started to stop, but then it took off at a fairly high rate of speed. The chase went through the Shelbyville Central High School parking lot onto the schoolyard. The defendant actually drove through something of a ditch continuing on Eagle Boulevard. It approached McGees . . . Trailer Park and stopped on the wrong side of the road at which time the driver, who was later identified as the defendant, and a passenger, both, jumped and ran on foot. The passenger was apprehended at the scene and the defendant was located or arrested at Lot 5 of McGees Trailer Park. Thus, that's the basis for violation of light law, the evading arrest of the vehicle, and the evading arrest on foot.
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> The officer observed that the defendant had a strong odor of alcohol about his person. He characterized him as uncooperative and that that [sic] he refused the field sobriety test and a Breathalyzer test, and according to the officer, the defendant admitted drinking six beers and two mixed drinks. The defendant's driver's license was revoked and it was revoked for a DUI. . . .

The trial court conducted a sentencing hearing on June 1, 2006. At the hearing, the defendant testified that he was thirty-six years old and incarcerated in the Bedford County Jail. He was not employed at the time of his arrest because he was disabled and suffering from a ventricle hernia and blood-born liver disease. He was also experiencing dizziness and memory loss and was in very poor physical health. The defendant had been in many car accidents from which he suffered various injuries. Prior to his arrest, the defendant was taking Lortab, Xanax, and Hydrocodone for his ailments. He had taken Hydrocodone the day he was arrested.

The defendant stated that he started drinking alcohol when he was nine years old and had been drinking between a fifth and half-gallon of whiskey a day at the time of his arrest. He also began using marijuana at age twelve and was using it daily. The defendant reported past use of methamphetamine and cocaine. At the time of his arrest, the defendant was employed doing odd jobs and his employer was supplying him with drugs.

The defendant testified that every charge and conviction in his record has stemmed from his alcohol and drug use. He has been in two very bad car accidents and has been in and out of jail since he was eighteen years old. He talked to someone about getting treatment, but he ended up back in jail before he could go. He said that jail has never helped him. The defendant admitted that he was released on bond but was picked up on new charges that were currently pending.

After the hearing, the trial court sentenced the defendant to one day in Count 1, six years as a Range II offender in Count 2, eleven months and twenty-nine days in Count 3, four years as a

Range II offender in Count 4, eleven months and twenty-nine days in Count 5, and eleven months and twenty-nine days in Count 6. Counts 1 through 3 were ordered to be served concurrently with each other, and Counts 4 through 6 were ordered to be served concurrently with each other and consecutively to Counts 1 through 3 for a total effective sentence of ten years. The trial court noted that the defendant had an extensive criminal record and that he presented an enormous threat to the public because of his addictions. The court then ordered that the defendant serve his sentence in confinement, finding that he was not a good candidate for an alternative sentence because "[h]e has profound problems that would suggest that he will, as he has [in the past,] repeat and repeat and repeat, except when he is incarcerated[.] [He is] a strong candidate to repeat, [and is] likely to be recidivistic . . . ."

ANALYSIS

On appeal, the defendant argues that "the more appropriate sentence in this case would be community corrections" rather than incarceration. He asserts that he qualified for community corrections sentencing under the provisions of subsections (a) and (c) of Tennessee Code Annotated section 40-36-106 because the crimes he committed were not of a violent nature and he is need of job training.

This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

A defendant is presumed to be a favorable candidate for alternative sentencing if he is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. *Id.* § 40-35-102(6). In determining a defendant's suitability for a non-incarcerative sentencing alternative, the court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Id. § 40-35-103(1)(A)-(c). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. *Id.* § 40-35-103(5). As a Range II multiple offender, the defendant was not entitled to a presumption in favor of alternative sentencing. *See id.* § 40-35-102(6).

The Community Corrections Act was meant to provide an alternative means of punishment for "selected, nonviolent felony offenders . . ., thereby reserving secure confinement facilities for violent felony offenders." Tenn. Code Ann. § 40-36-103(1); *see also State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). Pursuant to statute, offenders who satisfy all of the following minimum criteria are eligible for participation in a community corrections program:

(A) Persons who, without this option, would be incarcerated in a correctional institution;

(B) Persons who are convicted of property-related, or drug-or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;

(C) Persons who are convicted of nonviolent felony offenses;

(D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(E) Persons who do not demonstrate a present or past pattern of behavior indicating violence; [and]

(F) Persons who do not demonstrate a pattern of committing violent offenses[.]

Tenn. Code Ann. § 40-36-106(a). However, persons who are sentenced to incarceration or who are on escape at the time of consideration will not be eligible, even if they meet these criteria. *Id.*

Offenders who do not otherwise satisfy the minimum criteria and who would usually be considered unfit for probation due to histories of chronic alcohol abuse, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community may be considered eligible for participation in a community corrections program. *Id.* § 40-36-106(c). To

be eligible for community corrections under subsection (c), a defendant must first be eligible for probation under Tennessee Code Annotated section 40-35-303. *See State v. Staten*, 787 S.W.2d 934, 936 (Tenn. Crim. App. 1989). A defendant is eligible for probation if the actual sentence imposed is ten years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. See Tenn. Code Ann. § 40-35-303(a).

Although the defendant seemingly qualifies for sentencing under the Community Corrections Act, the Act provides that the criteria shall be interpreted as minimum standards to guide a trial court's determination of whether the offender is eligible for community corrections. *See* Tenn. Code Ann. § 40-36-106(d). The Community Corrections Act must be read together with the sentencing act as a whole. *See State v. Wagner*, 753 S.W.2d 145, 147 (Tenn. Crim. App. 1988). Our sentencing scheme permits the trial court to determine whether the defendant merits an alternative sentence to incarceration in light of all the circumstances.

At the sentencing hearing, the defendant testified that he was unable to work at the time of his arrest because he was disabled and suffered from various physical ailments and medical conditions, but later he testified that he was working and doing odd jobs and his employer was providing him with drugs. The defendant also testified regarding his problems with alcohol and substance abuse and how he needed to get treatment but always ended "up back in jail or something happens to where [he] can't go." The defendant's pre-sentence report was introduced into evidence at the hearing and contained his criminal record which spans five-and-a-half pages. His criminal record consists of five misdemeanor DUI convictions, five convictions for public intoxication, two convictions for driving on a revoked license, three convictions for possession of marijuana, two convictions for domestic violence and convictions for evading arrest, reckless driving, failure to appear, and facilitation of escape. The defendant has felony convictions for burglary, forgery, and fourth offense driving under the influence. Additionally, at the sentencing hearing, the state produced copies of warrants showing additional convictions for theft of property, and pending charges for third offense DUI, third offense driving on a revoked license, reckless driving, violation of the seat belt law, felony theft of property and two counts of felony failure to appear. The pre-sentence report also indicates that the defendant had his probation revoked on at least two occasions and was arrested on new charges while on bond pending sentencing in this case. Given the defendant's long history of criminal conduct and the failed past attempts using measures less restrictive than incarceration, we cannot conclude that the trial court abused its discretion in denying the defendant an alternative sentence of community corrections.

CONCLUSION

Based on the foregoing and the record as a whole, we affirm the sentencing decision of the Bedford County Circuit Court.

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J.C. McLIN, JUDGE